Spektra Segmen Sdn Bhd v TC Autoworld Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-03(IM)-81–10 OF 2021 AND B-03(IM)-82–10 OF 2021
ABDUL KARIM, ABU BAKAR JAIS AND COLLIN SEQUERAH JJCA
19 OCTOBER 2023

Damages — Assessment — Appeal against assessment — High Court set aside claim previously awarded by deputy registrar — Whether High Court erred in setting aside decision regarding losses and damages suffered

These two appeals ie Appeal 81 by Spektra Segmen Sdn Bhd ('Spektra') and Appeal 82 by TC Autoworld Sdn Bhd ('TC Auto') was against the decision of the learned judicial commissioner ('JC'). Spectra and TC Auto were adjacent landowners. Spectra's land was identified as Lot 330 while TC Auto's land was identified as Lot 331. Both Lot 330 and 331 were originally owned by a common landowner upon alienation, with several ownership changes until it was bought over by Spektra and TC Auto through separate purchases. The common landowner built a factory on Lot 331 with a wall built along the common boundary separating both lots. An extension to the existing factory on Lot 331 was built on Lot 330. The original wall for the factory on Lot 331 then became a party wall, which sat on the common boundary of the two lots. The party wall shared the same foundations and columns in order to support both the factory on Lot 331 and the extension on Lot 330. After Spektra purchased Lot 330, a survey was conducted and Spektra alleged that TC Auto's building had encroached into Spektra's land and demanded TC Auto to demolish the alleged encroachments. TC Auto denied the encroachment. Spectra filed a claim against TC Auto for unlawful encroachment and obtained a mandatory injunction dated 15 October 2009 against TC Auto, inter alia, for TC Auto to demolish and remove the structures which encroached onto Spectra's land along the common boundary of the parties ('2009 order'). The High Court granted the mandatory injunction on Spectra's express undertaking to indemnify TC Auto against all damages arising therefrom if the injunction was subsequently found ought not to have been given. On 23 February 2018, the Shah Alam High Court dismissed Spectra's claim against TC Auto for unlawful encroachment on Spectra's land and directed that any damages suffered by TC Auto connected to Spectra's mandatory injunction to be assessed. TC Auto commenced assessment of damages proceedings and claimed the sum of RM4,072,603.63 as costs incurred to demolish its entire building and to realign, reconfigure and reclaim space lost on account of the mandatory injunction. The deputy registrar allowed TC Auto's claim for damages. Spektra appealed against the decision and the JC allowed Spektra's

A appeal in part, where the decision of the deputy registrar was set aside, and the sum of RM403,200 for demolition costs alone was awarded to TC Auto as damages. Hence, these appeals by Spektra against the award of RM403,200 in damages and by TC Auto against the dismissal and setting aside of their claim for RM4,072,603.63 previously awarded by the deputy registrar in their B favour.

Held, dismissing Appeal 81 and allowing Appeal 82:

(1) The omission ie non-compliance with the necessity of the proposed C rectification works to be given to Spektra's consultant within 14 days from the 2009 order could not be used to justify the avoidance of the undertaking to indemnify in the event the order was found to have been wrongly sought at the end of the trial. Further, the fact that Spektra chose not to raise this issue even during the period of the demolition works D constituted a waiver and Spektra was estopped from now contending the non-compliance issue. In dismissing Spektra's claim against TC Auto, Shah Alam High Court had merely ordered damages suffered by TC Auto in connection with the mandatory injunction be assessed. The judgement was not predicated upon any pre-conditions to be fulfilled. E The point raised in this respect by Spektra was thus devoid of merit (see paras 27–30).

(2) The JC had erred in holding that the 3 metre setback resulted in the loss of floor space was not proven by way of evidence. The local council F guidelines adduced by SD3 would fall within the ambit of facts which by virtue of ss 56 and 57 of the Evidence Act 1950 ('the EA') respectively, the court could take judicial notice of. In addition, given that Spektra's witnesses had agreed with the 3 metre setback requirement, s 58 of the EA would be relevant thus obviating the need for express proof on the part of G TC Auto. Therefore, the court was constrained to depart from the findings of the JC that the requirement of the 3 metre setback was not proven (see paras 31, 45, 47 & 49).

(3) The findings and conclusions drawn by the deputy registrar were based on the evidence adduced during the hearing of the assessment of damages H and could not be impeached in any manner. The JC had erred when she took into account/considered the irrelevant consideration regarding TC Auto's decision to construct a new building and in so doing had failed to appreciate that TC Auto's claim was only limited to the loss of built-up space and services to TC Auto's original building within the 3 metre I setback requirement and based on the total loss area calculated for the original building. The JC had failed to appreciate that TC Auto's claim was unrelated to the costs of the construction of a new building. TC Auto's claim for damages was merely due to the loss of space and services to its original building along the common boundary within the 3 metre

setback area due to the mandatory injunction obtained by Spektra. In the premises, the learned JC had erred in setting aside the deputy registrar's decision regarding the losses and damages suffered due to compliance with the mandatory injunction (see paras 88, 93–95 & 99).

[Bahasa Malaysia summary

Kedua-dua rayuan ini iaitu Rayuan 81 oleh Spektra Segmen Sdn Bhd ('Spektra') dan Rayuan 82 oleh TC Autoworld Sdn Bhd ('TC Auto') adalah terhadap keputusan pesuruhjaya kehakiman yang bijaksana ('JC'). Spectra dan TC Auto ialah pemilik tanah bersebelahan. Tanah Spectra dikenal pasti sebagai Lot 330 manakala tanah TC Auto dikenal pasti sebagai Lot 331. Kedua-dua Lot 330 dan 331 pada asalnya dimiliki oleh pemilik tanah bersamasama setelah dipindah milik, dengan beberapa perubahan pemilikan sehingga ia dibeli oleh Spektra dan TC Auto melalui pembelian berasingan. Pemilik tanah bersama membina sebuah kilang di Lot 331 dengan tembok dibina di sepanjang sempadan bersama yang memisahkan kedua-dua lot. Sambungan kepada kilang sedia ada di Lot 331 telah dibina di atas Lot 330. Dinding asal untuk kilang di Lot 331 kemudian menjadi dinding pemisah, yang terletak di sempadan bersama dua lot itu. Dinding pemisah berkongsi asas dan tiang yang sama untuk menyokong kedua-dua kilang di Lot 331 dan sambungan di Lot 330. Selepas Spektra membeli Lot 330, tinjauan telah dijalankan dan Spektra mendakwa bangunan TC Auto telah menceroboh tanah Spektra dan menuntut TC Auto untuk merobohkan pencerobohan yang didakwa. TC Auto menafikan pencerobohan itu. Spectra memfailkan tuntutan terhadap TC Auto kerana pencerobohan yang menyalahi undang-undang dan memperoleh injunksi mandatori bertarikh 15 Oktober 2009 terhadap TC Auto antara lain untuk TC Auto merobohkan dan mengalihkan struktur yang menceroboh tanah Spectra di sepanjang sempadan bersama pihak-pihak ('perintah 2009'). Mahkamah Tinggi memberikan injunksi mandatori ke atas aku janji ekspres Spectra untuk menanggung rugi TC Auto terhadap semua ganti rugi yang timbul daripadanya jika injunksi itu kemudiannya didapati tidak sepatutnya diberikan. Pada 23 Februari 2018, Mahkamah Tinggi Shah Alam menolak tuntutan Spectra terhadap TC Auto kerana pencerobohan yang menyalahi undang-undang ke atas tanah Spectra dan mengarahkan supaya sebarang kerosakan yang dialami oleh TC Auto berkaitan dengan injunksi mandatori Spectra untuk dinilai. TC Auto memulakan penilaian prosiding ganti rugi dan menuntut jumlah RM4,072,603.63 sebagai kos yang ditanggung untuk merobohkan keseluruhan bangunannya dan untuk menjajarkan semula, menyusun semula dan menuntut semula ruang yang hilang akibat injunksi mandatori. Timbalan pendaftar membenarkan tuntutan TC Auto untuk ganti rugi. Spektra merayu terhadap keputusan itu dan JC membenarkan rayuan Spektra sebahagiannya, di mana keputusan timbalan pendaftar telah diketepikan, dan jumlah RM403,200 untuk kos perobohan sahaja telah diberikan kepada TC Auto sebagai ganti rugi. Oleh itu, rayuan oleh Spektra terhadap pemberian ganti rugi RM403,200 dan oleh TC Auto terhadap

penolakan dan penepian tuntutan mereka sebanyak RM4,072,603.63 yang sebelum ini diberikan oleh timbalan pendaftar yang memihak kepada mereka.

Diputuskan, menolak Rayuan 81 dan membenarkan Rayuan 82:

(1) Peninggalan iaitu ketidakpatuhan terhadap keperluan cadangan kerja pembetulan diberikan kepada perunding Spektra dalam tempoh 14 hari dari perintah 2009 tidak boleh digunakan untuk mewajarkan pengelakan akujanji untuk menanggung rugi sekiranya perintah itu ditemui telah dipohon secara salah pada akhir perbicaraan. Tambahan pula, hakikat bahawa Spektra memilih untuk tidak membangkitkan isu ini walaupun dalam tempoh kerja-kerja perobohan merupakan penepian dan Spektra telah diestop bagi sekarang mempertikaikan isu ketidakpatuhan. Dalam menolak tuntutan Spektra terhadap TC Auto, Mahkamah Tinggi Shah Alam hanya mengarahkan ganti rugi yang dialami oleh TC Auto berhubung injunksi mandatori itu dinilai. Penghakiman itu tidak berdasarkan sebarang pra-syarat yang perlu dipenuhi. Perkara yang dibangkitkan dalam hal ini oleh Spektra adalah tidak mempunyai merit (lihat perenggan 27–30).

(2) JC telah terkhilaf dalam berpendapat bahawa jarak undur 3 meter mengakibatkan kehilangan ruang lantai tidak dibuktikan melalui keterangan. Garis panduan majlis tempatan yang dikemukakan oleh SD3 akan termasuk dalam lingkungan fakta yang menurut ss 56 dan 57 Akta Keterangan 1950 ('AK') masing-masing, mahkamah boleh mengambil perhatian kehakiman. Di samping itu, memandangkan saksi Spektra telah bersetuju dengan keperluan jarak undur 3 meter, s 58 EA akan menjadi relevan sekali gus mengelakkan keperluan untuk keterangan nyata di pihak TC Auto. Oleh itu, mahkamah telah dihalang untuk beralih daripada penemuan JC bahawa keperluan jarak undur 3 meter tidak dibuktikan (lihat perenggan 31, 45, 47 & 49).

(3) Penemuan dan kesimpulan yang dibuat oleh timbalan pendaftar adalah berdasarkan keterangan yang dikemukakan semasa pendengaran taksiran ganti rugi dan tidak boleh dicabar dalam apa-apa cara. JC telah terkhilaf apabila mengambil kira/mempertimbangkan pertimbangan yang tidak relevan berkenaan keputusan TC Auto untuk membina bangunan baharu dan dengan berbuat demikian telah gagal untuk menghargai bahawa tuntutan TC Auto hanya terhad kepada kehilangan ruang terbina dan perkhidmatan kepada bangunan asal TC Auto dalam lingkungan keperluan jarak undur 3 meter dan berdasarkan jumlah kawasan kerugian yang dikira untuk bangunan asal. JC telah gagal untuk menghargai bahawa tuntutan TC Auto tidak berkaitan dengan kos pembinaan bangunan baharu. Tuntutan ganti rugi TC Auto adalah semata-mata kerana kehilangan ruang dan perkhidmatan kepada bangunan asalnya di sepanjang sempadan bersama dalam kawasan jarak

undur 3 meter disebabkan oleh injunksi mandatori yang diperoleh Spektra. Dengan premis itu, JC yang bijaksana telah terkhilaf mengenepikan keputusan timbalan pendaftar berhubung kerugian dan kerosakan yang dialami akibat pematuhan injunksi mandatori (lihat perenggan 88, 93–95 & 99).]

Cases referred to

Jeffery Law Siew Su & Ors v Yu Gui [2017] 3 MLJ 1, FC (refd)
Khoo Hi Chiang v Public Prosecutor and another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784; [2017] 1 LNS 500, CA (refd)

Legislation referred to

Evidence Act 1950 ss 56, 57
Rules of Court 2012 O 38 r 12

(Tan Shang Neng) in Civil Appeal No B-03(IM)-81–10 of 2021 for the appellant and in Civil Appeal No B-03(IM)-82–10 of 2021 for the respondent.
(S Murthi & Assoc) in Civil Appeal No B-03(IM)-82–10 of 2021 for the appellant and in Civil Appeal No B-03(IM)-81–10 of 2021 for the respondent.

Collin Sequerah JCA:

INTRODUCTION

[1] This is an appeal by Spektra Segmen Sdn Bhd ('Spektra') in Civil Appeal No B-03(IM)-8110 of 2021 and by TC Autoworld Sdn Bhd ('TC Auto') in Civil Appeal No B-03(IM)-82–10 of 2021 respectively against the decision of the High Court dated 20 September 2021.

[2] Spektra's appeal is against the award of RM403,200 in damages while TC Auto's appeal is against the dismissal and setting aside of their claim for RM4,072,603.63 previously awarded by the deputy registrar in their favour.

BACKGROUND FACTS

[3] Spectra and TC Auto were adjacent landowners whose lands were located between Jalan 223/51A in the Northwest and the Federal Highway in the Southeast of Petaling Jaya.

[4] Spectra's land is identified as Lot 330, Pajakan Negeri 4483, Bandar Petaling Jaya, Daerah Petaling, Negeri Selangor Darul Ehsan (hereinafter referred to as 'Lot 330').

A **[5]** TC Auto's land is identified as No 4483, Lot 331 Seksyen 14 Mukim Petaling Jaya, Daerah Petaling Jaya (hereinafter referred to 'Lot 331').

[6] Both Lot 330 and 331 were originally owned by a common landowner upon alienation, with several ownership changes until it was bought over by the
B plaintiff and the defendant through separate purchases.

[7] In 1964 the common landowner of Lots 330 and 331 built a factory on Lot 331 with a wall built along the common boundary separating both lots.

C

[8] In 1969, an extension to the existing factory on Lot 331 was built. The extension was built on Lot 330 in the form of a semi-detached building adjoining the existing factory on Lot 331.

D **[9]** The original wall for the factory on Lot 331 then became a party wall, which sat on the common boundary of the two lots. The party wall shared the same foundations and columns in order to support both the factory on Lot 331 and the extension on Lot 330.

E

[10] The dispute between the parties arose after the plaintiff purchased Lot 330, when it appointed a consultant engineer and a land surveyor to conduct a survey and advise on the proposed development of a six-storey office block with two underground floors for car parks.

F

[11] The survey conducted led to the plaintiff alleging that the defendant's building had encroached into the plaintiff's land and demanding that the defendant demolish the alleged encroachments by a certain date. The defendant denied the encroachment.

G

[12] As a result of this sequence of events, by way of an action dated 23 November 2006, Spectra filed a claim against TC Auto for unlawful encroachment and obtained a mandatory injunction dated 15 October 2009 against TC Auto, inter alia, for TC Auto to demolish and remove the structures
H which encroached onto Spectra's land along the common boundary of the parties (hereinafter referred to as 'the impugned structures').

[13] The impugned structures comprised the ground and first floor walls, concrete aprons and drains, pad and strip footings, and pillars.
I

[14] The High Court granted the mandatory injunction on Spectra's express undertaking to indemnify TC Auto against all damages arising therefrom if the injunction was subsequently found ought not to have been given.

[15] On 23 February 2018, the Shah Alam High Court dismissed Spectra's claim against TC Auto for unlawful encroachment on Spectra's land and directed that any damages suffered by TC Auto connected to Spectra's mandatory injunction to be assessed by the Shah Alam High Court.

[16] TC Auto commenced assessment of damages proceedings and claimed the sum of RM4,072,603.63 as costs incurred to demolish its entire building and to realign, reconfigure and reclaim space lost on account of the mandatory injunction.

[17] The assessment was heard at first instance by the deputy registrar where oral evidence was led.

[18] On 1 March 2021, the deputy registrar allowed TC Auto's claim for damages in the sum of RM4,072,603.63.

[19] Spektra appealed to the High Court judge in chambers against the decision of the deputy registrar.

[20] On 20 September 2021, the learned High Court judge ('HCJ') allowed Spektra's appeal in part, where the decision of the deputy registrar was set aside, and the sum of RM403,200 for demolition costs alone was awarded to TC Auto as damages.

ANALYSIS AND FINDINGS

[21] The immediate trigger event leading to the filing of these appeals stems from the award of the mandatory injunction by Spektra against TC Auto on 15 October 2009.

[22] The salient terms of the 15 October 2009 order are therefore crucial to the issue of assessment of damages and they are set out as follows:

(a) that the defendant immediately remove, pull-down or demolish the protrusions at the encroached areas 1 to 4 (as stated below) above and below ground on that part of the plaintiff's land so affected, namely:

(i) the defendant's wall on the bottom floor which encroached onto the plaintiffs land measuring 0.16m to 0.19m in width from the boundary between the parties' lands and up to 9.44m in length (encroached area 1);

(ii) the defendant's wall on the first floor which encroached onto the plaintiff's airspace measuring 0.63m to 0.79m in width from the boundary and up to 10.65m in length (encroached area 2);

(iii) the apron (i.e. walkway) and concrete drain which encroached onto the plaintiff's land measuring 1.29m to 2.395m from the boundary and up to 54.82m in length (encroached area 3); and

(iv) the 10 pad-footing together with pillars and 1 strip footing which encroached onto the plaintiff's land below ground measure 0.465m to 0.929m in width from the boundary (encroached area 4);

(b) alternatively, the defendant immediately carry out rectification works and return the affected part of the plaintiffs land to its original state;

(c) further to (a) and (b), that:

(i) the defendant extends to the plaintiff's consultant a detailed proposal of the rectification works to be carried out by the defendant for approval within 14 days from the 2009 order;

(ii) within 14 days upon receiving approval from the plaintiff's consultant, the defendant to extend the detailed proposal of the rectification works to be carried out by the defendant as approved by the plaintiff to the relevant authorities for approval;

(iii) the costs of such rectification works to be paid by the defendant; and

(iv) as soon as the rectification works have been completed, the defendant is to apply and obtain approval and/or certificate of approval from the local authorities.

[23] It is established by case law that in the area of a claim for damages, there must be a causal link between the injunction and the damage suffered by the defendant. See the Federal Court case of *Jeffery Law Siew Su & Ors v Yu Gui* [2017] 3 MLJ 1.

[24] Before considering the issue of damages itself however, it is apposite to consider the fact that Spektra contended at the very outset that there was non-compliance with the terms of the order of 2009 as it was a term that the proposed rectification works were required to be given to their consultant within 14 days of the order of the court given on 15 October 2009.

[25] Spektra also contended that the proposed rectification works had to be approved by the relevant authorities along with a certificate of fitness following the completion of the works.

[26] This contention was however dismissed by the learned judicial commissioner ('JC') on the grounds that the said approval was to merely facilitate the rectification works in removing the encroachment to avoid disputes arising as to the extent of the works and the costs involved and

therefore this could not constitute a valid ground for avoiding the responsibility for the damages arising pursuant to the undertaking given.

[27] We agree with the reasoning given by the JC that this omission cannot be used to justify the avoidance of the undertaking to indemnify in the event the order was found to have been wrongly sought at the end of the trial.

[28] Further to this, the fact that Spektra chose not to raise the issue of non-compliance with the necessity of the proposed rectification works to be given to their consultant within 14 days of the order of the court given on 15 October 2009 even during the period of the demolition works, save for the first time during the assessment of damages stage, constitute a waiver and Spektra is estopped from now contending the non-compliance issue.

[29] Still further to this, it is apparent from the Shah Alam High Court Judgement dated 23 February 2018 that in dismissing Spektra's claim against TC Auto, it had merely ordered damages suffered by TC Auto in connection with the mandatory injunction be assessed.

[30] The said judgment was not predicated upon any pre-conditions to be fulfilled. The point raised in this respect by Spektra is thus devoid of merit.

[31] Coming now to the main issue at hand regarding the damages, the main reason given by the JC in setting aside the decision of the deputy registrar in awarding the sum of RM4,549, 685 was that the 3 metre setback resulting in the loss of floor space was not proven by way of evidence.

[32] The JC said that an officer from the relevant department having jurisdiction over bylaws could have been called but was not. The HCJ consequently reasoned that as the setback requirement had not been established, no causal link was established between the claim for the sum of RM4,072,603.63 and the 2009 order.

[33] It was also found by the JC that the said claim of RM4,072,603.63 was merely an estimate and that such costs were not in fact actually incurred and that it was a hypothetical figure computed by DW3 who was TC Auto's engineer and expert.

[34] The JC went on to say that TC Auto had constructed an entirely new building with its specifications that bore no causal link to the 2009 order and thus found the costs computed too remote.

A **[35]** In the premises, the JC set aside the award of the sum of RM4,072,603.63 given by the deputy registrar and only allowed the demolition costs for the sum of RM403,200.

B **[36]** As pointed out by learned counsel for TC Auto, it is pertinent here to consider the effect that the mandatory injunction of 2009 had on the structure of TC Auto's building.

C **[37]** The most significant effect of the mandatory injunction on TC Auto's Building located on the common boundary was the demolition and relocation of the building 3 meters away from the boundary.

D **[38]** It was submitted by TC Auto that since the impugned structures mentioned in the mandatory injunction supported an entire side of TC Auto's two-storey building along the common boundary; it was not possible to just cut off or to remove the impugned structures because to do so would affect the overall structural integrity of TC Auto's building and would render TC Auto's building unsafe.

E **[39]** SD3 clearly stated in his evidence that there was a requirement to provide for a 3 meter setback for a detached building according to local council guidelines. He also produced the 'Manual Panduan Piawaian Perancangan Negeri Selangor 'Edisi Kedua' — which stated 'Anjakan sisi (sempadan bersama) — 3.1 m'.

F **[40]** The applicability of these guidelines was not denied by Spektra or their experts.

G **[41]** It was pointed out by learned counsel for TC Auto that Spectra's own witnesses, SP2 and SP3 had agreed with TC Auto's expert SD3 and confirmed that TC Auto's building was demolished and moved 3 meters away from the common boundary and any failure to comply with the 3 meter setback would result in a contravention of the law.

H **[42]** This was borne out in the evidence of SP2 and SP3 respectively adduced during the assessment hearing and reproduced here as follows:

Cross-examination of SP2 on 16 March 2020

I SM: Pakar-pakar tersebut telah mengatakan bahawa sebarang bangunan yang dibina harus mempunyai setback atau jarak 3 meter daripada sempadan. Adakah En Zul ketahui tentang syarat tersebut? 3 meter setback from the boundary, En Zul tahu ya?

ZUL: Ini, yes tahu.

SM: Alright Jadi setuju jika saya mengatak an sebarang pembinaan bangunan right, perlu ada anjakan setback 3 meter daripada sempadan tanah? Setuju?

ZUL: Setuju.

Cross-examination of SP3 on 17 March 2020

SM: Alright. Now, so according to your ... according to you, there is a by-law requirement for all above and below ground structures to be located at least 3m from the boundary.

KHAIRI: Yes.

SM: There is a setback. That be correct?

KHAIRI: Yes, sir.

Cross-examination of SP3 on 17 March 2020

SM: Alright? So, you have earlier confirmed your recommendation that and it is a building by-law requirement. There should be a 3m setback, and that's what you are telling TC Auto to comply.

KHAIRI: Yes.

[43] It was also suggested in cross-examination that when TC Auto demolished the impugned structures along the common boundary pursuant to the mandatory injunction, TC Auto needed to consider the requirement of the 3 meters setback from the boundary as follows:

Cross-examination of SP3 on 17 March 2020

SM: Alright. I'm also suggesting to you ... now, besides demolishing the impugned structures along the boundary, you have already said that 22 there is a requirement for a 3 metres setback, right?

KHAIRI: Yes.

Cross-examination of SP3 on 17 March 2020

SM: Alright. So, in order to comply with this 3m setback as per your recommendation, that would entail not only demolishing the impugned structures or structures along the boundary, but also to demolish all structures on Lot 331 of TC Auto, to provide at least for the area of 3m, to provide for the setback. Isn't it?

KHAIRI: Yes.

SM: Alright. So, it's only by then the building line can be brought 3m away from the boundary. That be correct, yes?

KHAIRI: Yes.

[44] Notwithstanding the said admissions, the JC nevertheless held that there was no proof of the 3 metre set back requirement.

[45] With the greatest respect to the JC, we find that she had erred in this respect. The local council guidelines comprising the 'Manual Panduan Piawaian Perancangan Negeri Selangor 'Edisi Kedua' which constitute Uniform Building By-Laws, adduced by SD3 would fall within the ambit of facts which by virtue of ss 56 and 57 of the Evidence Act 1950 ('the EA') respectively, the court can take judicial notice of.

[46] The sections are reproduced hereunder as follows:

> 56 Fact judicially noticeable need not be proved
>
> No fact of which the court will take judicial notice need be proved.
>
> 57 Facts of which court must take judicial notice
>
> (1) The court shall take judicial notice of the following facts:
>
> (a) all laws or regulations having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof,

[47] In addition, given the fact that Spektra's witnesses namely SP2 and SP3, had agreed with the 3 metre set back requirement, s 58 of the EA would be relevant thus obviating the need for express proof on the part of TC Auto.

[48] The section reads as follows:

> 58 Facts admitted need not be proved
>
> (1) No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

[49] We are therefore constrained to depart from the findings of the JC that the requirement of the 3 metre set back was not proven.

[50] The direct consequence of TC Auto's compliance with the 3 metre set back ruling is that removing the impugned structures would affect the structural integrity of TC Auto's original building.

[51] SP3 who was Spektra's Expert gave evidence in favour of TC Auto on this issue as follows:

> SM: Listen carefully, without doing much, merely demolishing.
>
> Khairi: Yes.
>
> SM: Right, the *impugned structures along the boundary could affect the structural integrity*.
>
> Khairi: Yes.

SM Ok, that's fair. Right. Now, again, En. Khairi, I refer you back to your witness statement, PB, Q&A 7(i) and (ii), your recommendation. You see that? Where you say that 'the impugned structures along the boundary must be demolished and to provide for a setback of the buiiding of 3m away from the boundary.' Now, in order to comply with that, 'demolish all the impugned structure and to provide with 3m setback,' you would agree that *TC Auto has to also consider the structural integrity of the old building. Would that be correct?*

KHAIRI: Yes.

[52] Following from this piece of evidence that merely demolishing the impugned structures along the boundary could affect the structural integrity, is the closely related issue of what constituted the next step of action as far as TC Auto was concerned with in complying with the mandatory injunction.

[53] The options that faced TC Auto were to either only remove the impugned structures along the boundary by allowing 3 meters set back from the common boundary or to demolish and rebuild the whole of the TC Auto's building as a detached building away from the common boundary.

[54] After taking into account advice from TC Auto's consultants that it would be a lower risk to demolish the whole building and to rebuild instead of just cutting off part of the TC Auto's building to allow for the 3 meters set back as required by the bylaws, TC Auto demolished the whole of the original structure to build a new structure.

[55] As a direct result of the mandatory injunction obtained by Spektra, TC Auto lost the use of the built-up area and the loss of space because a detached building required 3 meters setback from the boundary in compliance with the local council guidelines.

[56] TC Auto therefore also had to realign, reconfigure, and reclaim the loss of built-up area, space and structures due to the compliance with Spektra's mandatory injunction order.

[57] It is also vitally important to bear in mind the emphasis by learned counsel for TC Auto that their claim here is only limited to the loss arising from the removal of impugned structures, loss of space due to the need to comply with the requirement of the 3 meters set back and facilities and compensation for such losses to the original structure.

[58] This is clearly borne out by TAC's expert report, which stated the following:

A This report with costs analysis is based on the premise that to comply with the Court injunction stated above; the 3 meters set back will have to be provided for the perimeter walls at the common boundary. This will result in loss of floor space, rooms, staircases, roof and overhang, vehicle service bays and other facilities which have to be reinstated by modifying the existing building'

B

[59] It is also noteworthy that Spectra's expert SP3 agreed with the premise stated by SD3 in his report, in particular, that besides the loss of space, the 3 meter set back requirement would result in loss of floor space, rooms, staircases, roofs and overhangs, vehicle bays and other facilities which would have to be C reinstated by modifying the existing building.

[60] SD3 employed the following methodology for the preparation of the TAC expert report:

D Having studied all relevant documents and information which was provided by TC Auto and the requirements of the mandatory injunction, he concluded that it was not possible just to cut off or to remove the impugned structures (being part of the structures attached to TC Auto's building), along the boundary because the impugned structures supported an entire side of the TC Auto's two-storey building along the common boundary, and to do so would affect the overall structural E integrity of the TC Auto's building and would make the TC Auto building unsafe.

[61] SD3 then considered the loss of services, loss of space, rooms staircases ramps and other facilities and the way to replace such losses by creating new spaces and facilities.

F

[62] SD3 finally listed that the following works would have to be carried out:

(a) creation of support for beams perpendicular to party walls and new perimeter beams;

G

(b) creation of floor space and workshop floor and service space loss due to the set back of 3 meters from the common boundary;

(c) design for additional floor space, workshop space, staircases and ramps; and

H

(d) drawings for the changes due to the setback.

[63] SD3 then prepared and produced drawings for his proposal as shown in Appendix A of TC Auto's expert report and based on the drawings, SD3 came up with the calculations on the quantum of the costs and damages involved. I

[64] Here again, it is vital to emphasise that SP2 agreed with SD3 on the methodology employed to assess the damages flowing as follows:

Cross-examination of SP2 on 16 March 2020

SM: Dalam bullet point pertama, mengikut Perunding TAC mengatakan bahawa 'this report with cost analysis is based on the premise to comply with the Court injunctions stated above 3 meter setback will have to be provided from the perimeter wall at the common boundary. This will result in loss of space, room, staircase, roof overhang, vehicle service bay and other facilities which have to be reinstated by modifying the existing building.' Now, Berdasarkan laporan pakar Perunding TAC, setuju saya mengatakan bahawa mengikut pakar Perunding TAC, dengan memberi anjakan 3 meter, maka terdapat kerugian floor space, room, staircase, roof overhang, vehicle and other facilities? Itu yang dinyatakan oleh Perunding TAC. Setuju tak dalam laporan mereka?

ZUL: Setuju.

SM: Alright. Dan mengikut bullet point 1, ekoran daripada *anjakan 3 meter daripada boundary ataupun sempadan maka perlu ada pengubahsuaian untuk compensate, ataupun … to compensate for a lack of a good word, to compensate the loss of space. Itu yang dinyatakan oleh Perunding TAC. Setuju? You need to reinstate by modifying the existing building, that's what it says.*

ZUL: Correct lah statement itu, bersetuju.

SM: Alright, setuju. Correct statement, setuju. Alright. Now, jadi boleh saya mengatakan bahawa dalam laporan pakar anda, anda tidak langsung mengambil kira faktor, bukan saja faktor anjakan 3 meter yang diperlukan tetapi juga loss of space dalam Lot 331? Setuju?

ZUL: Setuju.

[65] SP3 also agreed with the methodology employed by SD3 as follows:

Cross-examination of SP3 on 17 March 2020

SM: *Now, here you will note that the report produced by Perunding TAC is for assessment of damages which is incurred by the TC Auto pursuant to the injunction. That's what their report says. Alright. Now, I would like you to look at the executive summary, which was of Perunding TAC's report, bullet 1, the first bullet, En Khairi, where Perunding TAC has stated that, 'This report with cost analysis is based on the premise that to comply with the Court injunction stated, 3m setback would be provided, would have to be provided from the perimeter wall at the common boundary. This will result in loss of space, rooms, staircases, roof overhang, vehicle service bay and other facilities would have to be reinstated by modifying the existing building.' That's what the Perunding TAC says.*

KHAIRI: Yes.

SM: So, would you agree with bullet 1 of Perunding TAC?

KHAIRI: Yes.

[66] It was based on the specific methodology employed by SD3, that he had particularized the construction costs at item 4.8 of his report and concluded that the total costs involved would amount to the sum of RM4,072,603.63.

[67] The calculation was based upon the actual drawings produced by SD3 for the resulting loss of space and reconfiguration caused to the building as a direct result of the mandatory injunction.

[68] Here again, it is important to make the point that Spectra's own expert, namely SP3 had agreed to the kind or type of losses suffered by TC Auto as a result of the mandatory injunction as borne out by the following testimony:

Cross-examination of SP3 on 17 March 2020

> SM: Now, you have earlier agreed that not only the TC Auto, based on your recommendation, not only has the TC Auto to demolish the impugned structure, but they also had to actually have a setback of 3m in compliance. *And you also agreed that by providing the 3m setback, there will be loss of space, staircase, structures.*
>
> KHAIRI: Yes.
>
> SM: Ok. So now, En Khairi, my question is this. *In order to comply with the 3m setback* and just now you agreed that it would mean that you have *to demolish part of the* TC *Auto 's building* to allow for the 3m setback from the boundary based on your recommendation.
>
> KHAIRI: Ok.
>
> SM: So looking at the original building plans of the TC Auto's building, in order to provide the 3m setback and to demolish part of the building, *that would mean the demolishing will be … entail demolishing spaces, staircases, rooms, which were located along the boundary. That be correct?*
>
> KHAIRI: Yes.
>
> *SM: Now, again En Khairi, to make way for the 3m setback, and if the TC Auto were to comply with the 3m setback, then TC Auto would naturally lose what was then existing staircase, spaces, structures which were located along the boundary. Would that be correct?*
>
> KHAIRI: *Yes.*
>
> *SM: Alright. And you then accept, as a professional with a considerable experience, that this demolition work and to provide for the 3m setback would entail the TC Auto incurring cost and expense naturally, right?*
>
> KHAIRI: Yes.

[69] As compared to the expert report prepared by SD3, SP2's expert report suffered from obvious flaws and none more important than his failure to consider the structural integrity of TC Auto's original building.

[70] While SP2 admitted that any demolition works of the impugned structures must consider the structural integrity of TC Auto's original building, he admitted that he did not consider the effect on the structural integrity of TC Auto's original building in his report and further admitted that he did not have any expertise on this issue.

[71] Without reviewing the drawings related to the impugned structures, SP2 could not have been aware that the destruction or removal of these impugned structures could affect the structural integrity of TC Auto's original building.

[72] While SP2 agreed to the necessity to provide for a 3 meter set back from the common boundary, he admitted he did not consider the 3 meters set back requirement under the by-laws in his expert report.

[73] The relocation of TC Auto's building line away from the common boundary would require strengthening of TC Auto's building, which would involve costs and expenses. Unfortunately, these factors were not considered by SP2 in his expert report.

[74] In the premises, SP2 also admitted that his cost estimate would not cover the order of the High Court for the assessment of damages dated 23 February 2018.

[75] As far as the expert report of SP3 is concerned, it is relevant to refer to what the HCJ in its grounds in the main trial held as follows:

> To make out their case, P sought to rely, amongst others on their consultants' reports from M/S JHS, Terramodal, and M/S Khairi which were adduced as evidence via their expert affidavits. D however, contented, in my view rightly that the reports are fatally flawed in the sense that the consultants failed or omitted to consider that the impugned structures along the common boundary of Lots 330 and 331 were shown to have been erected by the predecessor in title ... in 1964. Hence, the expert reports and the findings therefore would be incomplete and most likely lead to an incorrect conclusion ...

[76] As pointed out by learned counsel for TC Auto, such findings of the High Court regarding SP3 and his expert report can be considered in the assessment of damages under O 38 r 12 of the Rules of Court 2012.

[77] The deputy registrar's pivotal findings in the assessment, inter alia, considered that any demolishment of the impugned structures along the common boundary would affect the structural integrity of TC Auto's building located at the common boundary.

[78] Based upon the evidence including that of SP3 who agreed that it was not possible just to cut off or demolish the impugned structures along the common boundary without affecting the structural integrity of TC Auto's building and that TC Auto's building must be strengthened after the demolishment of the impugned structures, the Registrar therefore found that

in order to comply with Spectra's injunction order, TC Auto would have to strengthen TC Auto's original building.

[79] After taking into account the advice from TC Auto's consultants that it would be a lower risk to demolish the whole building and to rebuild instead of just cutting off part of the TC Auto's building to allow for the 3 meters set back as required by the bylaws, TC Auto therefore demolished the whole of the original structure to build a new structure.

[80] The deputy registrar also importantly found that in order to comply with Spectra's injunction order, TC Auto not only must demolish the impugned structures along the common boundary but also must comply with the 3 meter set back requirement.

[81] Accordingly, it was found that as a result of Spectra's injunction and the need to comply with the 3 meters set back, TC Auto would not only lose space but also services and facilities which they had in TC Auto's old building such as rooms, staircases, and other facilities which were located along the common boundary.

[82] The deputy registrar also relied upon the expert report prepared by SD3 where the method of assessment of loss of space, rooms, staircase, roof overhang, vehicle service bay and other facilities was done by the method of assessing the manner on how to reinstate the loss by modifying TC Auto's original building structure.

[83] SD3 listed the works involved in the reconfiguration and realignment of the building plans of TC Auto's original building as follows including:

(a) creation of floor space and workshop floor and service space loss due to the setback of 3 meters from the common boundary;

(b) design for additional floor space, workshop space, staircases, and ramps; and

(c) drawings for the changes due to the setback.

[84] SD3 then produced the reconfigured drawings for TC Auto's original building in his TAC's expert report. SD3 then particularised his costs analysis which was based on the actual drawings produced by SD3 for the loss of space and reconfiguration caused to TC Auto's original building as a result of the mandatory injunction

[85] The registrar found that Spektra's experts never challenged these drawings.

[86] To summarise, the deputy registrar's key findings in this regard were as follows:

(a) SD3's quantification and calculations were supported by drawings prepared by him;

(b) the methodology and approach employed by SD3 in his expert report was agreed to by Spectra's experts, SP2 and SP3;

(c) unlike SP2, SD3's calculations are based on actual drawings of TC Auto's building which was demolished;

(d) SD3's drawings prepared for the assessment of damages were not challenged by Spectra's counsel;

(e) SD3's expert evidence is more reliable than Spectra's expert evidence and witnesses; and

(f) Spectra did not call any representatives of Spectra's company or to produce any reports to contradict SD3.

[87] In the circumstances, the deputy registrar accepted the expert report and quantification provided by SD3 in his expert report and accordingly awarded the damages that she did.

[88] As can be readily appreciated from the foregoing analysis, the findings and conclusions drawn by the deputy registrar were based on the evidence adduced during the hearing of the assessment of damages and cannot be impeached in any manner.

[89] Being an estimate, there was no requirement for TC Auto or SD3 to prove his cost analysis to a mathematical certainty. See *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151 and *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500 .

[90] In respect of the findings of the JC, having accepted the deputy registrar's finding that the order for removal of the impugned structures would affect the structural integrity and it would be more expedient to demolish the entire building, nonetheless only allowed for demolition costs.

[91] Principally, the underpin of the JC's decision in this respect was in finding that the 3 metre set back requirement was not established. With the greatest of respect to the HCJ, she had erred in this respect for the reasons given earlier.

[92] This consequently resulted in the error of failure to consider the computation of the loss of space facilities due to the 3 metre set back requirement.

[93] The JC further, with the greatest of respect, had erred when she took into account/considered the irrelevant consideration regarding TC Auto's decision to construct a new building and in so doing had failed to appreciate that TC Auto's claim was only limited to the loss of built-up space and services to TC Auto's original building within the 3 metres set back requirement and based on the total loss area calculated for the original building.

[94] The JC had failed to appreciate that TC Auto's claim was unrelated to the costs of the construction of a new building.

[95] TC Auto's claim for damages was merely due to the loss of space and services to its original building along the common boundary within the 3 meter setback area due to the mandatory injunction obtained by Spektra.

[96] Spektra had submitted and alleged that TC Auto's claim here was compromised by TC Auto in a settlement arising from the Shah Alam Civil Suit No 22–168 of 2010 ('Suit 168').

[97] Regarding Suit 168, TC Auto's Director, SD1 had explained as follows:

(a) that Suit 168 was initiated against Spektra for damages caused to TC Auto's original building due to the construction works carried out by Spektra on its own land;

(b) a settlement was reached between one of the subcontractors appointed by Spektra. The said subcontractor agreed to compensate TCA for the repair of the damage caused. It is to be noted that the settlement was with one of Spektra's subcontractor who was made a party to the proceedings;

(c) there was no issue in the Suit about demolishing the impugned structures or shifting of the building with 3 meters setback resulting in losses to TC Auto; and

(d) unlike in Suit 168, this claim for losses before the registrar was in connection with Spektra's mandatory injunction to remove the impugned structures which supported the TC Auto's building and did not overlap with Suit 168.

[98] We therefore find no merit in this submission.

[99] In the premises, we unanimously find that the learned JC had erred in

setting aside the deputy registrar's decision regarding the losses and damages suffered due to compliance with the mandatory injunction.

[100] We accordingly set aside the decision of the JC in part and reinstate the whole of the decision of the deputy registrar. We thus dismiss the appeal by Spektra in Appeal No B-03(IM)-81–10 of 2021 and allow the appeal by TC Auto in Appeal No B-03(IM)-82–10 of 2021.

[101] We also award costs for each appeal to TC Auto in the sum of RM10,000 subject to allocator.

Appeal 81 dismissed and Appeal 82 allowed.

Reported by Nabilah Syahida Abdullah Salleh